

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 01-244
(Judge Charles W. Cope)

Case No. SC01-2670

**SPECIAL COUNSEL’S RESPONSE
TO MOTION FOR COSTS AND ATTORNEY’S FEES**

The Special Counsel hereby responds to Respondent’s Motion for Costs and Attorney’s Fees and states:

Costs

1. The Hearing Panel lacks authority to consider a motion to tax costs. The Supreme Court of Florida has that exclusive authority. *See In re Hapner*, 737 So. 2d 1075, 1076 (Fla. 1999) (“Under this constitutional scheme, this Court--not the JQC--is vested with the authority to tax costs.”).

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2. Judge Cope is not the prevailing party in these proceedings as he was specifically found guilty of violating the Code of Judicial Conduct pursuant to Counts I and III. Contrary to his statement in his motion, Judge Cope did not admit to this conduct. He denied the charges and underlying allegations in his Answer and

¹ Unless the Supreme Court of Florida determines that no discipline should be imposed, the Special Counsel hereby reserves the JQC’s right to demand costs under Rule 2.140, Florida Rules of Judicial Administration.

Affirmative Defenses and asserted that the allegations of his public intoxication and inappropriate conduct “fail to state a cause of action” and that the JQC lacked jurisdiction over the charge of inappropriate conduct. The Florida Rules of Civil Procedure provide in part, “When a pleader intends in good faith to deny only a part of an averment, the pleader shall specify so much of it as is true and shall deny the remainder.” Fla. R. Civ. P. 1.110(c). Among the averments that he denied were:

a. In the early morning hours of April 4, 2001, while in Carmel-by-the-Sea, California for a judicial conference, you became intoxicated and wandered the public streets. (Amended Notice of Formal Proceedings ¶ 1.)

b. When the women discovered that the door to their hotel room was locked and they could not find their key, you suggested they come to your hotel room at the La Playa Hotel a few blocks away. (*Id.* at ¶ 4.)

c. You and the two women began walking down the middle of the public street in an obviously intoxicated state and were picked up by a police officer, who drove the three of you to your hotel. (*Id.* at ¶ 5.)

d. After the police officer returned the two women to their hotel room during the early morning hours of April 4, 2001, you returned to the women’s room and asked the daughter to walk with you on the beach. (*Id.* at ¶ 12.)

e. Regardless of whether the daughter initiated the intimate conduct

or actively resisted sexual advances by your, your conduct tends to undermine the public's confidence in the judiciary and demeans the judicial office. (*Id.* at 14.)

f. During the evening of April 4 and early morning hours of April 5, 2001, you again became very intoxicated in public and wandered the streets. (*Id.* at ¶ 6.)

3. Judge Cope further denied the allegations in his Answers to First Set of Interrogatories (a copy of which is attached as **Exhibit A**) and in his Response to Request for Admissions (a copy of which is attached as **Exhibit B**). As late as June 11, 2002, less than two weeks before the trial, Judge Cope swore under oath again that these discovery responses, which denied the allegations quoted above, were true in his Answers to Third Set of Interrogatories (a copy of which is attached as **Exhibit C**).

4. Even during settlement negotiations when Judge Cope offered to plead to public intoxication, he firmly insisted that he did nothing wrong under Count III. Attached as **Exhibit D** is a page from a letter from Mr. Merkle from settlement negotiations in which he expressly stated that this was Judge Cope's position.

5. The costs Judge Cope demands are grossly in excess of those awardable under Rule 2.140, Florida Rules of Judicial Administration, which limits recoverable costs to "(1) court reporters' fees, including per diem fees, deposition costs, and

costs associated with the preparation of the transcript and record; and (2) witness expenses, including travel and out-of-pocket expenses.”

6. Judge Cope demands such unrecoverable and unreasonable costs as:

a. travel time for his attorneys and their families (including in-town travel to attend meetings with Judge Cope and to attend the trial and charges for cancelled plane tickets);

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b. “travel expenses to Barnes & Noble bookstore to locate a book on cross-examination”;

c. a polygraph examination;

d. attorney’s fees for “J. Gregory Merkle – Associate Counsel for purposes of Maryland depositions”;

e. costs related to depositions of witnesses not called to testified and costs related to transcripts not actually used at trial;

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f. long distance telephone charges, conference call charges, facsimile

² Aside from *In re Hapner*, the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions (the “Uniform Guidelines”) are the closest authority on point for determining taxable costs. The Uniform Guidelines do not allow taxation of any travel expenses by the prevailing attorney and expressly prohibit taxing of travel expenses “incurred in connection with the taking of depositions out of the City or State.” *Id.* at ¶3.

³ The Uniform Guidelines provide that depositions costs are recoverable to the extent the deposition was read into evidence at trial. *Id.* at ¶ 1(A), (B). These guidelines specifically provide that costs of depositions not used at trial are not recoverable absent unusual circumstances. *Id.* at ¶ 1(E).

charges, and photocopy charges;

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g. unspecified investigative services;

h. “weather information”;

i. nearly \$2,400 for “document enlargements” (presumably for the single enlarged map used at trial);

j. witnesses charges and fees for experts who did not testify,

⁵ including no less than three separate “expert witness fees” for Arthur England (shown on affidavit of costs for May 31, 2002 (\$5000.00), June 26, 2002 (\$1389.02) and July 31, 2001 (\$1418.14) (more than thirty days after the trial);

k. “professional services” for Sidney J. Merin, Ph.D.; and

l. the deposition transcript of a witness who was not deposed (at least not with notice) (i.e., University of California Records Custodian).

7. None of these expenses are awardable either under Rule 2.140 or the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions. The Supreme Court of Florida has expressly held that travel costs are not recoverable costs. *In re Hapner*, 737 So. 2d at 1077.

⁴ The Uniform Guidelines expressly provide that long distance costs are not taxable. *Id.* at ¶ 6. They only allow photocopies to be taxed for copies actually filed in Court or received in evidence at trial. *Id.* at ¶ 7. It provides that copies obtained during discovery and not used at trial generally should not be taxed. *Id.*

⁵ The Uniform Guidelines regarding taxing of expert costs all contemplate that any taxable costs relate to an expert whose live testimony or deposition testimony was offered at trial. *Id.* at ¶ 2.

8. Judge Cope also provides no documentation to support any of the costs. There is no invoice showing that Judge Cope has been charged these costs or has paid them. There are no receipts. There is no description of how any of the listed items relates to the case or why such costs should be considered taxable. Before any costs can be taxed, the Special Counsel demands an evidentiary hearing, and before that hearing, the Special Counsel must be afforded the right to inspect all underlying documents and conduct any other necessary discovery.

9. The Supreme Court of Florida has warned that “the costs assessed in a JQC proceeding be kept within strict bounds” because the amount of costs to be taxed to the prevailing party “must not be so substantial that costs will deter either the JQC from initiating a prosecution or a judge from defending against a charge.” *In re Hapner*, 737 So. 2d at 1076.

Attorney’s Fees

10. The Supreme Court of Florida has held that attorney’s fees may not be awarded to the prevailing party in JQC proceedings. *Id.* at 1077.

11. Section 57.105, Florida Statutes only applies to civil proceedings and actions, not actions in front of the Florida Judicial Qualifications Commission. *Cf. Procacci Commercial Realty, Inc. v. Dep’t of Health and Rehab. Servs.*, 690 So. 2d 603, 608 n.8 (Fla. 1st DCA 1997) (§ 57.105 only applies to civil proceedings, not

administrative proceedings); *State v. LoChiatto*, 381 So. 2d 245, 247 (Fla. 4th DCA 1979) (§ 57.105 only applies to civil proceedings, not criminal proceedings).

12. Moreover, the decision to press the charges against Judge Cope was not made by Special Counsel, rather it was made by the constitutionally designated charging authority – the Florida Judicial Qualifications Commission’s Investigative Panel. The Hearing Panel has no jurisdiction to review that decision.

13. Most importantly of all, however, the alleged factual basis for § 57.105 sanctions is absolutely false. See Affidavits of John S. Mills and Thomas C. MacDonald attached hereto as **Exhibits E and F**.

14. Finally, the \$316,465.00 in fees demanded by Judge Cope are unreasonable. Even if there were a legitimate basis for an award of fees, Judge Cope’s demand is wholly unsupported by evidence required to determine whether they are reasonable. No time descriptions are provided, no expert testimony is provided, no qualifications of the various time keepers is offered, etc. Discovery and evidentiary hearing would be required before any determination of amount.

WHEREFORE, Respondent’s Motion for Costs and Attorney’s Fees should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and regular U.S. mail to: **Robert W. Merkle, Jr., Esq.**, Co-

Counsel for Respondent, 5510 W. La Salle Street, #300, Tampa, Florida 33607-1713; **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Ave., Miami, Florida 33175-1716; **John Beranek, Esq.**, Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32301; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602 this __ day of August, 2002.

By: _____

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